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No. 96 39

In The

Supreme Court of the United States

October Term, 1995

INTEROCEANICA CORPORATION, TURBANA CORP., M/V POTOMAC, her engines, boilers, tackle, etc., *in rem*, M/V POCAHONTAS, her engines, boilers, tackle, etc., *in rem*, and M/V POCANTICO, her engines, boilers, tackle, etc., *in rem*,

Petitioners,

vs.

MICHAEL BALL, C.A. MASSEY, D.J. McINERNEY and T.J. KNIERIM,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the State of New York violate the Boundary Waters Act, 46 U.S.C. § 8501(b), when it expanded the area of exclusive pilotage rights on Long Island Sound for New York licensed ship pilots to the detriment of both Connecticut licensed ship pilots and Connecticut shipping companies who were thereafter, as a result, required to pay additional pilotage fees?

PARTIES TO THE PROCEEDING

Petitioners are two shipping companies which maintain offices in Bridgeport, Connecticut, and three ships which they operated under charter, as well as the ships' engines, boilers, tackle, etc., *in rem*. The petitioners were all defendants in the United States District Court, as well as the United States Court of Appeals for the Second Circuit.

Respondents are all ship pilots, licensed by the State of New York to provide pilotage services to vessels operating in the New York waters of Long Island Sound, as well as waters of Long Island Sound in which there is concurrent jurisdiction.

Respondents were all plaintiffs in the United States District Court and appellees in the Court of Appeals.

There are no other parties to this action.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations Iv

Opinions Below 1

Statement of Jurisdiction 1

Statutes and Regulations Involved 1

Statement of the Case 3

Reasons for Granting the Writ 6

I. Certiorari Should Be Granted So That the Court May Adjudicate the Scope of the Boundary Waters Act, 46 U.S.C. § 8501(b), and Determine Whether New York Violated the Act by Expanding the Area of Exclusive Pilotage for Its Licensed Ship Pilots on Long Island Sound, Thereby Increasing Costs for Connecticut Shippers. 6

Conclusion 10

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133 (2d Cir. 1994) 3, 6

Leech v. Louisiana, 214 U.S. 175 (1909) 6, 7, 8, 9

Sweatt v. Florida Board of Pilot Commissioners, 776 F. Supp. 1538 (M.D. Fla. 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993) 7

Warner v. Dunlap, 532 F.2d 767 (1st. Cir. 1976), *cert. dismissed*, 470 U.S. 1024 (1985) 7

Statutes Cited:

28 U.S.C. § 1254(1) 1

46 U.S.C. § 8501(b) 1, 4, 6

New York Navigation Law § 89-b 2, 3

New York Navigation Law § 89-b(1) 5

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Second Circuit Filed April 11, 1996 ..... 1a

Appendix B — Order of the United States Court of Appeals for the Second Circuit Filed December 1, 1995 ..... 3a

Contents

Page

Appendix C — Opinion and Order of the United States District Court for the Southern District of New York Filed November 8, 1994 ..... 12a

OPINIONS BELOW

By Opinion and Order dated November 8, 1994, the United States District Court for the Southern District of New York granted judgment to the petitioners on their claim for pilotage fees. That Opinion and Order is reported at 867 F. Supp. 226 (S.D.N.Y. 1994).

The District Court's judgment was affirmed by the United States Court of Appeals for the Second Circuit by decision dated December 1, 1995, That opinion is reported at 71 F.3d 73 (2nd Cir. 1995).

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Second Circuit and its judgment of December 1, 1995. A petition for rehearing was timely filed and was denied on April 11, 1996,

Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

46 U.S.C. § 8501(b) provides:

> The master of a vessel entering or leaving a port on waters that are a boundary between 2 States, and that is required to have a pilot under this section, may employ a pilot licensed or authorized by the laws of either of the 2 States.

New York Navigation Law § 89-b (Pre-November 27, 1991), provided in pertinent part:

> Every . . . vessel . . . transiting the New York state waters of Long Island Sound . . . east of Execution Rocks or Sands Point, and any such vessels entering or departing from any port situated on the New York state waters of Long Island Sound east of Execution Rocks or Sands Point, shall take a Long Island-Block Island Sound pilot licensed under the authority of this article or of the laws of any other state having concurrent jurisdiction over these waters.

New York Navigation Law § 89-b (Post-November 27, 1991), provides in pertinent part:

> Every . . . vessel . . . transiting the New York state waters of Long Island Sound . . . east of Execution Rocks or Sands Point . . . shall take a Long Island-Block Island Sound pilot licensed under the authority of this article, Every foreign vessel and every American vessel under register transiting the New York state waters of Long Island Sound . . . east of a line running southeasterly from the mouth of the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island shall take a pilot licensed under the authority of this article or the laws of any other state having concurrent jurisdiction over these waters.

STATEMENT OF THE CASE

Prior to November 27, 1991, § 89(b) of New York's Navigation Law required every foreign vessel and every American vessel sailing under register transiting the New York waters of Long Island Sound east of Execution Rocks or Sands Point to utilize the pilotage services of a New York licensed Long Island Sound-Block Island Sound pilot, or one licensed under "the laws of any other state having concurrent jurisdiction over these waters." The State of Connecticut was deemed to have such concurrent jurisdiction over the waters of Long Island Sound. *See Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133,142 (2d Cir. 1994). Under the law as it then existed, Connecticut licensed pilots regularly piloted vessels between Connecticut ports on Long Island Sound and Execution Rocks, the western terminus of Long Island Sound.

On November 27, 1991, Governor Mario Cuomo of New York signed into law an amendment to Section 89(b) of the Navigation Law, which moved the line for concurrent jurisdiction eastward some seven and a half (7 1/2) miles from Execution Rocks to "a line running southeasterly from the mouth of the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island." West of the line solely New York pilots could be used.

The effect of the Amendment was to prohibit Connecticut licensed ship pilots from piloting ships between Connecticut ports on Long Island Sound and the western end of the Sound. For Connecticut shippers it meant a substantial increase in pilotage rates on each one way voyage between, *e.g.*, Bridgeport and the Port of New York. Before the Amendment that voyage required the payment of two pilotage fees — westbound, one fee for the Connecticut pilot providing services for the thirty (30) miles between Bridgeport and Execution Rocks and one fee to the New

York licensed pilot who would navigate the vessel down the East River and into the port. After the Amendment there would be a new fee to a third pilot, the New York licensed Long Island Sound pilot, for guiding the vessel the seven and a half (7 1/2) miles between the newly created line and Execution Rocks.

From the time the Amendment was receiving serious consideration by the New York Legislature to the time it was ready for the Governor's signature, Connecticut officials spoke out against the Amendment's enactment. Thus, Attorney General Richard Blumenthal wrote to New York Senator John Sheffer, Chairman of the Senate Committee reviewing the proposed legislation, warning that passage of the Amendment "would have a significant adverse impact on the cooperative relations that the states of New York and Connecticut have developed in recent years" and "would be in direct conflict with federal law," *i.e.*, the Boundary Waters Act, 46 U.S.C. § 8501(b).

After the Amendment passed the Legislature, Governor Lowell Weicker wrote Governor Cuomo urging him to veto it as the Amendment would have an "adverse effect . . . on both the shipping industry, as it would be required to hire two pilots to navigate a vessel through Long Island Sound, and on the cooperative relationship between New York and Connecticut."

New York's officials paid lip service to the concerns of their Connecticut counterparts, with its Attorney General writing that the Amendment should be construed solely to move the pilot exchange point away from Execution Rocks and not to restrict the rights of Connecticut licensed pilots. Governor Cuomo, in his approval message upon signing the Amendment into law, echoed the Attorney General's position as to statutory construction.

Nevertheless, as the District Court held, the Amendment's

language was clear on its face in extending the area of exclusivity for New York licensed pilots.

After the Amendment's passage, petitioners, Interoceanica Corporation and Turbana Corporation, shippers operating out of Bridgeport, relied upon advice of the Connecticut Department of Transportation, which in turn relied upon the statements of New York's officials, that the Amendment did not restrict Connecticut licensed pilots. They, therefore, rejected the demand of New York Sound Pilots that their services be utilized. Rather, they continued to entrust their multimillion dollar ships and cargo to the pilots they had been using, those licensed by Connecticut.

Following ten such voyages, four New York licensed pilots brought suit for fees under § 89-b(1) of New York's Navigation Law. The action was brought in the United States District Court for the Southern District of New York pursuant to the Court's admiralty jurisdiction.

The defendants urged in opposition, *inter alia*, that the Amendment violated the Boundary Waters Act. The District Court, however, rejected that defense and that rejection was affirmed by the Court of Appeals, largely for the reasons set forth by the District Court. Petitioners now seek issuance of a writ of certiorari so that this Court may consider whether the extension of exclusivity by New York for its pilots, in the context of the geography of Long Island Sound, comports with the policy and terms of the Boundary Waters Act.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED SO THAT THE COURT MAY ADJUDICATE THE SCOPE OF THE BOUNDARY WATERS ACT, 46 U.S.C. § 8501(b), AND DETERMINE WHETHER NEW YORK VIOLATED THE ACT BY EXPANDING THE AREA OF EXCLUSIVE PILOTAGE FOR ITS LICENSED SHIP PILOTS ON LONG ISLAND SOUND, THEREBY INCREASING COSTS FOR CONNECTICUT SHIPPERS.

By arbitrarily expanding the exclusive pilotage zone for its pilots, the New York Legislature disregarded the concerns of the State of Connecticut, as expressed by that State's governor and Attorney General, as well as the policy behind the Boundary Waters Act. That policy, as recognized by the Second Circuit Court of Appeals, is to "avoid pilotage wars between adjacent states, with each state attempting to appropriate for its pilots some exclusive privilege or advantage in a bay or harbor." *Interport v. Sammis,* 14 F.3d 133, 136-137 (2d Cir. 1994).

New York has, in fact, obtained a great advantage for its pilots in Long Island Sound to the detriment of Connecticut shippers and Connecticut licensed pilots. A challenge to that conduct based on the Boundary Waters Act has failed, however, largely because of one clause in an opinion by Justice Holmes in the case of *Leech v. Louisiana,* 214 U.S. 175 (1909). In that clause the Court held concurrent jurisdiction between bordering states ceased "at the point at which [the waters] cease to be a boundary between two states." *Id.* at 178. That limitation upon the Boundary Water Act, however, has been taken out of context of both the language and facts of *Leech.*

Leech was the last time this Court reviewed issues regarding the Boundary Waters Act. In *Leech* the Court considered whether a predecessor to the current Boundary Waters Act protected a Mississippi licensed ship pilot against a charge that he had wrongfully piloted a ship into the Port of New Orleans. In a less than one page decision, the court rejected the defendant pilot's Boundary Water's Act defense because the Mississippi River, at New Orleans, was not a boundary between Mississippi and Louisiana. The Boundary Waters Act, therefore, did not sanction use of a Mississippi pilot's license for service of ships entering or leaving the Port of New Orleans. Justice Holmes opined, however, that the Boundary Waters Act might apply if the pilot, instead of using his Mississippi license to bring ships into and out of New Orleans, just passed through New Orleans on the way to Mississippi:

> If the pilot in error had undertaken to pilot from the Gulf to Natchez, a different question would have been presented, and it may be that in that case the Mississippi license would have been good.

Id.

Since the decision in *Leech* lower courts have seized upon the language that the Boundary Waters Act's applicability is limited to the specific areas of actual boundary to deny the right of a pilot licensed by one state to pilot through a neighboring state's waters which are not part of the boundary. *See, e.g., Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976), *cert. dismissed*, 470 U.S. 1024 (1985) and *Sweatt v. Florida Board of Pilot Commissioners*, 776 F. Supp. 1538 (M.D. Fla. 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993).

The lower courts, however, have ignored Justice Holmes'

language concerning destination. Under that language, although a Connecticut pilot may not use his license to use non-boundary areas as a base of operations, he ought to be able to service ships en route to or from Connecticut ports through the non-boundary parts of boundary waters.

Treating Justice Holmes' proscription in *Leech*, that the coverage of the Boundary Waters Act extends only to the area of actual boundary, too literally may lead to absurd results. Where, for example, there are islands in boundary waters which belong to one of the two boundary states, a literal reading of the act could require changes in pilots as each island is passed. Using New York Harbor as an example, a ship coming into the Harbor from sea heading to Hoboken, New Jersey, could, according to the Boundary Waters Act, employ a New Jersey pilot until it came to the area of the Verrazano Bridge, where the waters are bounded by two land areas of New York State, Brooklyn and Staten Island. It would have to use a New York pilot there, but could use a New Jersey pilot once it passed Staten Island. A New York pilot would then have to man the con again for the areas bounded by Ellis Island, the Statue of Liberty and Governor's Island. A New Jersey pilot would thereafter be required to be used for the confines of the Port of Hoboken.

Similarly, in Long Island Sound there would have to be a change in pilots each time a vessel traveled between an island in the Sound belonging to a bordering state and that state's mainland.

The focus, rather than being on precise boundaries, should be on both the policy behind the Act and the geography involved.

New York's expansion of its exclusive pilotage zone in Long Island Sound, to the detriment of Connecticut pilots and economic benefit of its own pilots, is in direct contravention of that policy.

This is not a case where, geographically, a state seeks to have only its pilots navigate on waters wholly within its boundaries. This is not, for example, New Orleans, which, although on the Mississippi river, is wholly within Louisiana. Here, rather, the movement of the line for exclusive jurisdiction seven and a half miles to the east, did not move it to a geographic location distinct from that near Execution Rocks. Rather, it was to an invisible and arbitrary line drawn by the New York Legislature for the benefit of its pilots.[1] Unlike *Leech* and the other cases decided under the Act, the pilotage at issue is in the same area as actual boundary waters. (*See* District Court Chart found at 33a).

The only reason for the extension of the exclusive pilotage area for New York pilots was to gain economic benefits for the New York pilots. Justice Holmes' language in *Leech* has been taken out of context and misapplied to accomplish that goal. The Boundary Waters Act and the policy behind it have thus been subverted.

It is respectfully requested, thus, a writ of certiorari issue so

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1. It is not altogether clear that Execution Rocks is not a boundary water in any event.

The lower courts in this matter only viewed the horizontal (east-west) border between New York and Connecticut and determined that north and south of Execution Rocks were two counties of New York. Execution Rocks was, thus, not deemed to be in boundary waters.

There is also, however, a vertical (north-south) boundary which is incorporated into the 1991 Amendment. East of that vertical line and north of the horizontal boundary are Connecticut waters.

Under the Boundary Waters Act Connecticut pilots ought to be able to operate west of the vertical boundary line, just as they can operate south of the horizontal line.

that this Court may consider the meaning and scope of the Boundary Waters Act and whether New York's actions, as described above, comport with the Act.

CONCLUSION

For the reasons stated, it is respectfully requested that the petition be granted and that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of April, one thousand nine hundred and ninety-six.

Dkt No: 95-7421

Ball

Plaintiffs-Appellees

v

Interoceanica Corp.

Defendants -Appellants

A petition for rehearing containing a suggestion that the action be *reheard* in bane having been filed herein by the appellant Interoceania Corp.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

Appendix A

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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inbancdn_ frm

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 443—August Term, 1995

(Argued: December 1, 1995 Decided: December 1, 1995)

Docket No. 95-7421

MICHAEL BALL, C.A. MASSEY, D.J. MCINERNEY, and T.G. KNIERIM,

Plaintiffs-Appellees,

—against—

INTEROCEANICA CORPORATION, TURBANA CORP., M/V POTOMAC, her engines, boilers, tackle, etc., in rem, M/V POCAHONTAS, her engines, boilers, tackle, etc., in rem, and M/V POCANTICO, her engines, boilers, tackle, etc., in rem,

Defendants-Appellants.

Before:

CARDAMONE, CALABRESI, *Circuit Judges,*
and NICKERSON, *District Judge.**

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* The Honorable Eugene H. Nickerson. Senior United States District fudge for the Eastern District of New York. sitting by designation.

Appendix B

Appeal by defendants ship owner, agent, & ships from an order of the United States District Court for the Southern District of New York (Pierre N. Leval, *Circuit Judge sitting by designation*), in favor of plaintiffs New York-licensed pilots after a bench trial based on a submitted written record. 867 F. Supp. 226 (S.D.N.Y 1994). The district court held that N.Y. Navigation Law § 89-b(l) (McKinney's Supp. 1995) requires vessels travelling in the Long Island Sound west of the Connecticut-New York border to use New York licensed pilots; that § 89-b does not violate the Federal Boundary Waters Act, 46 U.S.C. § 8501(b); that the plaintiff pilots were permitted to offer their pilotage services dockside in Bridgeport, Connecticut; and that defendants were liable for pilotage fees to the plaintiffs.

Affirmed.

JOEL N. KREIZMAN, Evans, Osborne, Kreizman and Bonney, Esqs., Little Silver, N.J., for *Defendants-Appellants*.

HERBERT B. HALBERG, Beck & Halberg, Esqs., New York, N.Y., *for Plaintiffs-Appellees.*

PER CURIAM:

Defendants Interoceanica Corporation, Turbana Corp., M/V Potomac, M/V Pocahontas, and M/V Pocantico (collectively, "Interoceanica"), appeal from a judgment entered on November 28, 1994, in the United States District Court for the Southern District of New York (Pierre N. Leval, *Circuit Judge sitting by designation*), in favor of plaintiffs Michael Ball, C.A. Massey, D.J. McInerney, and T.G. Knierim after a bench trial based on a written record. The defendants also appeal from the district court's denial of their motion for a new trial, entered on

Appendix B

April 12, 1995.

The plaintiffs are pilots licensed by the State of New York to navigate foreign vessels and United States vessels engaged in foreign trade in Long Island Sound. On several occasions, the plaintiffs offered their services to navigate the defendants' vessels through an area in the Long Island Sound west of the Connecticut-New York border, which is bounded on both sides by New York territory. The defendant Turbana Corp., whose vessels were either coming from or going to Connecticut ports, refused plaintiffs' services and instead used Connecticut-licensed pilots for this leg of the journey.

The plaintiff pilots brought this action for pilotage fees pursuant to New York Navigation Law § 89-b(l) (McKinney's Supp. 1995) (providing that refusal of required pilotage services, when offered, subjects vessels and owners/agents to payment of pilotage fees). Interoceanica answered that a 1991 amendment to § 89b did not alter the previous law under which either New York or Connecticut pilots could pilot vessels between Connecticut ports and Execution Rocks, a point in New York approximately 7.5 miles west of the Connecticut-New York border. Before November 27, 1991, that section provided as follows:

> Every . . . vessel . . . transiting the New York state waters of Long Island Sound . . . east of Execution Rocks or Sands Point . . . shall take a Long Island-Block Island Sound pilot licensed *under the authority of this article or of the laws of any other state having concurrent jurisdiction over these waters.*

Appendix B

N.Y. Nav. Law § 89-b(l) (McKinney's 1989) (emphasis added). The revised section deleted the language italicized above and instead added a new sentence. As amended, the section now reads:

> Every . . . vessel . . . transiting the New York state waters of Long Island Sound . . . east of Execution Rocks or Sands Point . . . shall take a Long Island-Block Island Sound pilot licensed *under the authority of this article.* Every . . . vessel . . . transiting the New York state waters of Long Island, Sound . . . east of a line running southeasterly from the mouth of the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island shall take a pilot licensed under the authority of this article or the laws of any other state having concurrent jurisdiction over these waters.

N.Y. Nav. Law § 89-b(1) (McKinney's Supp. 1995) (emphasis added).

We agree with the district court's conclusion that, according to the clear language of the revised statute, vessels must use the services of a New York-licensed pilot when passing through New York territorial waters in the western Long Island Sound. Like the district court, we are unpersuaded by the statements of various New York officials that purport to interpret the statute to permit Connecticut pilots to navigate in the western reaches of the Long Island Sound. These interpretations flatly contradict the plain language of the statute and therefore are of little guidance in interpreting that law.

Appendix B

The district court also concluded that § 89-b does not violate the Federal Boundary Waters Act, 46 U.S.C. § 8501(b), because the waters west of the Connecticut-New York border (which are bounded by Westchester County and Long Island) constitute territorial waters of the State of New York — not boundary waters between states that are subject to the limitations of § 8501(b).

Because the parties had produced insufficient evidence to decide whether § 89-b, as amended, violated the dormant Commerce Clause, the district court declined to rule on that issue. 867 F. Supp. 233 n.10. Finally, the district court rejected Interoceanica's contention that the New York pilots were required to "offer their services" pursuant to § 89-b by showing up in a pilot boat in the middle of the Sound, at the line where Connecticut pilots may no longer navigate the vessel, rather than by offering their services at the vessel while it was docked in Bridgeport. *Id.* at 233-34. In reaching that conclusion, the court observed that Interoceanica had not produced sufficient evidence that offering pilot services in the middle of the Sound was required by industry practice. *Id.*

We agree with Judge Leval's analysis of these issues. Accordingly, after consideration of all the arguments put forward by the parties, we affirm the judgment substantially for the reasons stated in the district court's opinion.

Interoceanica raises two further issues on appeal. It argues that the district court erred in failing to find that N.Y. Navigation Law § 89-b, if it excludes Connecticut pilots from the western waters of the Long Island Sound, violates 46 U.S.C. § 8501(c), which prohibits a state from "discriminat[ing] in the rate of pilotage . . . between the vessels sailing between the ports of one State and vessels sailing between ports of different States."

Although the district court did not address this issue in its written opinion, Interoceanica's contention can be rejected out of hand. Imagine two vessels sailing to New York City from Long Island ports, one from Port Jefferson, New York, and the other from Bridgeport, Connecticut. Each vessel, if it started with a Connecticut-licensed pilot, would have to switch to a New York-licensed Sound pilot for the western waters of the Sound, and then switch again to a New York Harbor pilot for the rest of the journey. Similarly, each vessel, if it started with a New York-licensed Sound pilot, would need to switch only once: to the New York Harbor pilot. At most, such an arrangement would discriminate against *pilots* holding only a Connecticut license. It certainly does not discriminate against vessels steaming from Connecticut *ports*. Accordingly, N.Y. Navigation Law § 89-b does not violate 46 U.S.C. § 8501(c).

Interoceanica also challenges the district court's denial of its motion for a new trial pursuant to Rule 59(a)(2) of the Federal Rules of Civil Procedure.[1] It contends that, because the district court found the trial record to be insufficient (a) with respect to the dormant Commerce Clause issue and (b) with respect to the question of whether pilots may offer their services dockside, the

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1. According to Rule 59(a)(2):

> A new trial may be granted . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

court should have held a new trial at which Inter oceanica could have filled the gaps in the record. It argues that this is especially necessary since the trial was based on submitted affidavits and transcripts of depositions.

This Court will reverse a district court's denial of a motion for new trial only if there has been an abuse of discretion. *Blissett v. Coughlin,* 66 F.3d 531, 535 (2d Cir. 1995). "[A] trial court should not grant a new trial merely because the losing party can probably present a better case on another trial." 6A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.08[2], at 59-97 (2d ed. 1989); *see also* 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE BC PROCEDURE § 2804, at 53 (2d ed. 1995) ("A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons."). Furthermore, Rule 61 of the Federal Rules of Civil Procedure counsels that no error "is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice." We believe that the district court acted within its broad discretion when it denied Interoceanica's motion for a new trial.

Interoceanica argues that a new trial is required because the district court excluded or failed to consider competent evidence, *see* MOORE ET AL., *supra* ¶ 59.15[3], at 59-305; we do not find that to be the case here. The only evidence that the district court excluded was fragmentary trial testimony from a prior case in federal court, in which none of the present parties was involved. This evidence was not submitted in conformity with the procedures to which the parties had stipulated, since the direct testimony of the witnesses was not subject to cross-examination at depositions. Furthermore, the evidence did not fit within the

exception carved out by Rule 804 of the Federal Rules of Evidence (admitting hearsay testimony given at a prior hearing by an unavailable witness, where the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination). Accordingly, the district court's exclusion of the evidence was proper and does not warrant a new trial.[2]

Behind Interoceanica's motion for a new trial, there seems to lie a belated objection to the form of trial used. But, in fact, both parties consented to the form of trial, and such a procedure falls within the district court's ample authority to manage the proceedings before it. The Ninth Circuit has expressly approved bench trials based on written submissions. *See, e.g., In re Adair,* 965 F.2d 777 (9th Cir. 1992) (holding that the bankruptcy court's standard procedure of requiring that direct testimony be presented by written declaration, while permitting oral cross-examination and redirect in open court, offended neither due process nor Federal Rule of Evidence 611(a)—which authorizes district court to control the "mode" of presenting direct testimony); *Phonetele Inc. v. American Tel. & Tel. Co.,* 889 F.2d 224, 232 (9th Cir. 1989) (affirming the district court's requirement that parties submit direct evidence in written form, while permitting parties to cross-examine adverse witnesses orally) ("The use of written testimony is an accepted and encouraged technique for shortening bench trials.") (citation omitted), *cert. denied,* 503 U.S. 914 (1990); *Malone v. U.S. Postal Serv.,* 833 F.2d 128, 133 (9th Cir. 1987), *cert. denied,* 488 U.S. 819 (1988) (upholding district court's authority to compel written testimony); *see also Eirhart v. Libbey-Owens-Ford Co.,*

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2. We have no occasion to decide what preclusive effect. if any, should be given to the district court's rulings in subsequent proceedings involving these or other parties.

996 F.2d 837, 840 (7th Cir. 1993) ("Rule 52 allows for matters to be tried to the district court on a written record; we do not read the Rule to require that an evidentiary hearing be held.") (citations omitted). Like the Ninth Circuit, we approve the procedure allowing the parties to produce direct evidence from their witnesses in writing while permitting subsequent oral cross-examination — particularly when the parties agree to that procedure in advance.

CONCLUSION

We affirm the judgment substantially for the reasons stated in the district court's opinion. *See Ball v. Interoceanica Corp.*, 867 F. Supp. 226 (S.D.N.Y. 1994).

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED NOVEMBER 8, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

92 Civ. 1139 (PNL)

Dated: November 8 , 1994

MICHAEL BALL, C.A. MASSEY, D.J. McINERNEY and T.J. KNIERIM,

Plaintiffs,

- against-

INTEROCEANICA CORPORATION, TURBANA CORP., M/V POTOMAC, and her engines, boilers, tackle, etc., *in rem*, M/V POCAHONTAS, her engines, boilers, tackle, etc., *in rem*, and M/V POCANTICO, her engines, boilers, tackle, etc., *in rem*.,

Defendants.

OPINION AND ORDER

Findings of Fact and Conclusions of Law

Appendix C

APPEARANCES:

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PIERRE N. LEVAL, U.S.C.J.*

This is an action for pilotage fees covering the westernmost portion of Long Island Sound (the "Western Sound"), explicitly a segment bounded on the east by a line running southeasterly from the mouth of the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island ("Byram River line"), and on the west by Execution Rocks and Sands Point. *See* appendix.[1] In 1991, New York State amended Section 89-b of its

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* Sitting by designation.

1. The appendix is a rough sketch of the western part of Long Island

(Cont'd)

Appendix C

Navigation Law. The amendment appears to state that only pilots licensed by New York for these waters are authorized to provide pilotage services there. The action depends on whether the amendment means what it appears to say. For the reasons that follow, in the absence of regulatory interpretation suggesting a different interpretation, I hold that the statute should be interpreted in accordance with its plain meaning.

Background

The plaintiffs are pilots licensed by the State of New York to navigate foreign vessels and U.S. vessels under registry (*i.e.*, engaged in foreign trade) in Long Island Sound. They are members of an organization known as Sound Pilots, which assigns pilots licensed by the State of New York to pilot such vessels through Long Island Sound.

Plaintiffs offered pilotage services at various times between December 3, 1991 and January 21, 1992, for navigation of defendants, vessels the M/V Pocahontas, the M/V Potomac, and the M/V Pocantico through the Western Sound.[2] They contend that under New York Navigation Law § 89-b, as amended, the services of New York licensed pilots were required for the Western Sound.

The defendant, Turbana Corporation, whose vessels were traversing the Sound to or from Connecticut Sound ports, refused plaintiffs, services, using instead Connecticut licensed

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(Cont'd)

Sound, showing the line from Oak Neck Point to the New York-Connecticut border at the Byram River, and the line from Execution Rocks to Sands Point at the western end.

2. All three ships are foreign vessels flying the Norwegian flag.

pilots for this leg of their journey. Under New York law, refusal of *required* pilotage services, when offered, subjects the vessels and their owners and agents to the payment of pilotage fees. *See* N.Y. Nav. Law § 89-b(1) (McKinney's Supp. 1993) ("Whenever the services of such a pilot are refused, the master, owners or consignees shall pay pilotage as if one had been employed."). Because plaintiffs' pilotage services were refused on ten occasions, they seek to recover $8097.30, which is ten times the Long Island Sound statutory pilotage fee of $809.73 per movement.

The defendants contend that the 1991 amendment of New York Navigation Law § 89-b did not alter the previously existing practice, under which either New York or Connecticut pilots piloted vessels between Connecticut ports and Execution Rocks at the westernmost end of the Sound.[3] Defendants argue that

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3. According to Bruce B. Fisher, President of Sound Pilots, Inc.

> New York State pilotage for Long Island Sound extends to Execution Rocks with a continuation to City Island for the purpose of being safely relieved west of Execution Rocks in the vicinity of City Island where the waters are protected by the lee of the land. At that point the pilotage jurisdiction shifts to the Sandy Hook pilots who pilot the vessel from that location into the Port of New York. On the other hand, going easterly, a Sandy Hook pilot will pilot the vessel from New York Harbor to the City Island Execution Rocks area where he would be relieved by a Long Island Sound pilot. A Sandy Hook pilot's license ends at Execution Rocks City Island which is the place where the Long Island Sound pilots license becomes effective.

Aff. at 6.

because their ships were being piloted to or from Connecticut ports through Long Island Sound by duly licensed Connecticut pilots, they' were not required to employ New York licensed pilots in the Western Sound.

The case was submitted to the Court for decision on a written trial record.

Discussion

Prior to November 27, 1991, Section 89-b(1) of the New York Navigation law provided, in pertinent part:

> Every . . . vessel . . . transiting the New York state waters of Long Island Sound . . . east of Execution Rocks or Sands Point, and any such vessels entering or departing from any port situated on the New York state waters of Long Island Sound east of Execution Rocks or Sands Point, shall take a Long Island-Block Island Sound pilot licensed under the authority of this article or of the laws of any other state having concurrent jurisdiction over these waters.

N.Y. Nav. Law § 89-b(1) (McKinney's 1989) (prior to 1991 amendment).

It is undisputed that, in practice under that statute, vessels employed either a Connecticut or a New York licensed pilot to traverse the Sound, including its western end.

As of November 27, 1991, however, the New York statute was amended to provide (in pertinent part):

Appendix C

> Every . . . vessel . . . transiting the New York state waters of Long Island Sound . . . east of Execution Rocks or Sands Point . . . shall take a Long Island-Block Island Sound pilot licensed under the authority of this article. Every foreign vessel and every American vessel under register transiting the New York state waters of Long Island Sound . . . east of a line running southeasterly from the mouth of the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island shall take a pilot licensed under the authority of this article or the laws of any other state having concurrent jurisdiction over these waters.

N.Y. Nav. Law § 89-b. (McKinney's Supp. 1993).[4]

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4. Apparently parallel changes were made at the same time to §89-b(2). Before 1991, it read:

> It shall be unlawful for any person not licensed as a Long Island-Block Island Sound pilot under this article *or of the laws of any other state having concurrent jurisdiction* to pilot or to offer to pilot any foreign vessel or any American vessel sailing under register transiting the New York State waters of Long Island Sound or Block Island Sound east of Execution Rocks or Sands Point . . .

N.Y. Nav. Law § 89-b(2) (McKinney's 1989)(emphasis added).

Subsequent to the 1991 revision, the statute reads:

> It shall be unlawful for any person not licensed as a

(Cont'd)

Appendix C

This case presents two questions. First, does the amended statute limit pilotage in the Western Sound to pilots licensed by New York, excluding pilots licensed by Connecticut? And (2) if so, does this violate federal law?

I. Does the 1991 amendment to § 89-b permit pilotage by a Connecticut licensee in the Western Sound?

On its face, the amended statute specifically asserts that the Western Sound waters may be navigated only by pilots "licensed under the authority of this article." The prior statute provided for pilotage through these waters by a pilot licensed either by New York or "any other state having concurrent jurisdiction," *i.e.*, Connecticut. The new statute drops that language as to the Western Sound, for which it asserts the requirement of a pilot licensed by New York; it retains the "concurrent jurisdiction" language only with respect to the Sound waters *east* of the New

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(Cont'd)

> Long Island-Block Island Sound pilot under this article to pilot or to offer to pilot any foreign vessel or any American vessel sailing under register transiting the New York State waters of Long island Sound or Block Island Sound east of Execution Rocks or Sands Point . . . . It shall be unlawful for any person not licensed as a Long IslandBlock Island Sound pilot under this article *or under the laws of any other state having concurrent jurisdiction* to pilot or to offer to pilot any foreign vessel or any American Vessel sailing under register transiting the New York State waters of Long Island Sound or Block Island Sound *east of a line running southeasterly from the mouth of the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island.*

N.Y. Nav. Law § 89-b(2) (McKinney's Supp. 1993)(emphasis added).

York-Connecticut border at the Byram River line.[5] On its face, the amended statute clearly excludes pilots not licensed by New York from providing pilotage services in the Western Sound. Indeed, the sole functions of the 1991 amendment appear to have been the assertion of territorial jurisdiction over the Western Sound, and the barring of Connecticut pilots therefrom.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Com. v. GTE/Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Under this standard, the defendants bear a heavy burden in attempting to persuade the court to interpret the statute otherwise than in accordance with its plain and unambiguous meaning. This burden has not been met.

The defendants make several arguments in support of their contention that the statute, in spite of its express words, authorizes Connecticut pilots to navigate in the Western Sound. They first point to a 1986 opinion by the Attorney General of the State of New York which asserts that even though the Western Sound is New York territorial water, it would violate the Federal Boundary Waters Act to prohibit Connecticut pilots from navigating thereon. *See* Formal Opinion No. 86-F5. As to the

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5. Reference to a nautical chart (*see* appendix), shows that the waters *east* of the line extending from the mouth of the Byram River to Oak Neck Point on Long Island, are bounded by Connecticut to the north and New York (Long Island) to the south, and are thus boundary waters shared by New York and Connecticut. *See generally Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133 (2d Cir. 1994). To the west of the statutory line, which is roughly perpendicular to the shore, the waters are bounded on both north and south by New York. The statute thus deems this western section New York territorial waters.

relevance of this opinion, the New York Legislature sitting in 1991 is in no way bound by an interpretation of federal law rendered by its state attorney general five years earlier. As the 1991 statutory amendment seems to perform no function other than to exclude Connecticut pilots from the Western Sound, it appears that the New York legislature was either ignorant of, or rejected, this opinion.

The defendants next point to a 1991 memorandum written by the Attorney General to Governor Cuamo purporting to explain the 1991 bill. *See* Memorandum for the Governor re Assembly 950, from Robert Abrams, Attorney General of New York, July 17, 1991. In this memorandum, Attorney General Abrams reiterated his 1986 position that under federal law "New York could not prohibit Connecticut licensed pilots from navigating on the New York waters of Long Island Sound if they were entering or departing a Connecticut port situated on the Sound." *Id.* He opined that the current § 89-b "provides that the waters of Long Island Sound east of Execution Rocks or Sands Point may be transited by a vessel employing either a New York-licensed pilot or a pilot licensed by a state having concurrent jurisdiction," and that the new

> bill would make clear that the portion of Long Island Sound bounded only by New York — west of a line running southeasterly from the Byram River at the New York-Connecticut boundary to Oak Neck Point on Long Island — is subject to regulation exclusively by New York. The law, if amended, would permit the relocation of the present pilot station, which is the transfer point between New York and Connecticut pilots, from a site

> near Execution Rocks to a place several miles to the east where the waters of the Sound are deeper and more open.

Id.

According to Attorney General Abrams, the purpose of the new bill was to shift the transfer point between New York Harbor pilots (Sandy Hook licensees), and Long Island Sound pilots, from Execution Rocks to Byram Point. It is not clear, however, whence he derived this interpretation, as it does not appear in the statutory language. His position that Connecticut pilots may navigate to Execution Rocks (and there be relieved by New York Harbor pilots) is difficult to reconcile with his contention that the Long Island Sound pilotage transfer will now take place five miles to the east of Execution Rocks at the state border — the Byram River line. Also, his opinion that pilots licensed by a state with concurrent jurisdiction may pilot ships east of Execution Rocks is directly contrary to the words of the amended statute, which deleted this very provision from the predecessor statute; the new statute makes clear that pilots operating west of the Byram River line [and east of Execution Rocks] must be licensed "under the authority of this article," N.Y. Nav. L § 89-b, and that concurrent jurisdiction exists only to the east of the Byram River Line. Furthermore, the defendants have provided no authority in support of the proposition that statutes should be interpreted in accordance with such a memorandum when it contradicts their terms.

Similar analysis governs the memorandum of Governor Cuomo filed with the amendment. *See* Memorandum of Governor Cuamo filed with Assembly Bill Number 950, November 27, 1991. In this memorandum, Governor Cuomo

seconded the analysis of the Attorney General, stating that the bill intended to improve safety of navigation and protect the environment "by establishing a new point at which New York State licensed pilots are required to be aboard a vessel traveling to a New York port." He noted his concern lest the bill "be interpreted to exclude pilots with Connecticut licenses from transiting between the Execution Rocks — Sands Point boundary and the new boundary further east." However, he concluded, based upon the 1986 opinion by the New York Attorney General reaffirmed in 1991, that the bill was not in conflict with federal law "provided that it is interpreted to permit transit on the waters of the Long Island Sound by Connecticut pilots on vessels traveling to and from Connecticut ports situated on the Sound." Governor Cuomo therefore stated that he approved the bill "based on this interpretation of the Attorney General." *Id.*

The memorandum is inconsistent with the words of the statute, and the defendants have provided no authority that such an interpretative gubernatorial memorandum can alter the meaning of a state statute when it directly contradicts the statute's terms.

Only slightly greater pause is given by a letter written by S. Fraser Sammis, President of Board of Commissioners of Pilots of the State of New York, to Richard Strauss, Deputy Commissioner of the Department of Transportation of the State of Connecticut, dated October 29, 1991. Interpretive deference is ordinarily given to agencies charged with administering a statutory scheme. *See generally Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Commissioner Sammis stated that:

Appendix C

> The Board is prepared to assure you, and to give its certification that the passage of A-950 into law will not in any way affect pilotage rates for vessels engaged in commerce between the States of Connecticut and New York. . . .
>
> a. The Bill changes, for purely safety reasons, the presently defined pilotage boundary away from Execution Rocks Reef to a point located at the NY/CT border, which is about five miles to the eastward.
>
> b. It is incorrect to imply that the area or zone between the old pilotage boundary (Execution Rocks Reef) and the new one (at the NY/CT) border would create an added pilotage rate zone or surcharge opportunity where vessels "shift", and which could then enable New York licensed pilots to assess a two-thirds surcharge over the base pilotage rate. To repeat, the passage of A950 will not create any new or extra charges in pilotage fees.

Although such thinking may conceivably underlie his conclusions, Commissioner Sammis did *not* say (as did Governor Cuomo and Attorney General Abrams) that under the amended statute Connecticut pilots may navigate the Western Sound under the authority of their Connecticut licenses.

I note that Connecticut officials apparently understood the bill as meaning what it says. Richard Blumenthal, the

Appendix C

Connecticut Attorney General, wrote to John B. Sheffer, II, Chair of New York State Senate Committee on Tourism, Recreation and Sports Development, on May 17, 1991, as the bill was under consideration. He noted that currently, shipping in most of Long Island Sound took place with either a Connecticut or New York licensed pilot, but that the proposed law would "require that all shipping on Long Island Sound west of [Byram] Point obtain a New York licensed pilot." He then pointed out that if the bill passed, he would recommend that Connecticut adopt similar legislation, the result of which would be that many shippers would need to employ two pilots to traverse the Sound.

Governor Lowell Weicker wrote a similar letter to Governor Mario Cuomo of New York. He urged a veto of the bill because it would have an adverse effect both on shipping (by mandating two pilots) and on "the cooperative relationship between New York and Connecticut." *See* letter of Governor Weicker to Governor Cuomo, August 2, 1991.

As defendants have presented no convincing evidence supporting a different interpretation, I read the amended statute, in accordance with its plain meaning, to require a pilot licensed by New York for these waters for navigation through the Western Sound.

In conclusion, I note that there has been some suggestion in the record that the New York administrative agency responsible for interpreting the statute, the Board of Commissioners of Pilots, interprets and implements the statute in accordance with the position of the Governor and the Attorney General — permitting Connecticut pilots to operate between Connecticut Sound ports and the transfer point for pilots operating in New York Harbor. However, no such interpretive material or other

evidence was submitted. If in another litigation, such administrative interpretations were submitted, they might justify a different interpretation of the statute.

It is troubling to render what is potentially so important a judgment on so skimpy a record, devoid of administrative interpretation, especially where the Governor and Attorney General of New York made statements about the meaning of the bill that are inconsistent with its literal terms. Notwithstanding their statements to the contrary, the express terms of this Act threaten to put Connecticut pilots out of business for voyages that traverse the Sound. If the legislative intent was merely to move the transfer point as between New York Harbor pilots and Long Island Sound pilots (whether licensed by Connecticut or New York) from Execution Rocks to the Byram River line, this is not easily found in the words of the statute.

The fact that both the Governor and the Attorney General believed this Act would permit Connecticut pilots to continue to operate in the Western Sound raises the question whether the bill was disingenuously lobbied, and thus raises the further question whether New York's legislators correctly understood the consequences of the bill they passed.

Nonetheless, on the record presented, the court is powerless to do otherwise than to enforce the statutory law as it is written.

II. Is the amended statute valid under federal law?

Having concluded that the statute restricts pilotage on the New York territorial waters of Long Island Sound to New York licensees, it remains to be decided whether, as defendants contend, this result contravenes the Federal Boundary Waters Act, 46 U.S.C. § 8501, *et seq.*

Appendix C

This Act, provides, in relevant part:

(a) Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States.

(b) The master of a vessel entering or leaving a port on waters that are a boundary between 2 States, and that is required to have a pilot under this section, may employ a pilot licensed or authorized by the laws of either of the 2 States.

(c) A State may not adopt a regulation or provision that discriminates in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or against vessels because of their means of propulsion, or against public vessels of the United States.

. . .

(e) Any regulation or provision violating this section is void.

46 U.S.C. § 8501.

Under § 8501(b), a ship entering or leaving a port located on "boundary waters" may be piloted by pilots licensed by either of the two boundary states.[6]

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6. In *Interport Pilots Agency Inc. v. Sammis*, 14 F.3d 133 (2d Cir. 1994), (Cont'd)

Appendix C

In 1986, the New York Attorney General opined that in light of the purpose of the federal boundary statute, to prevent pilotage wars between adjacent states, "[b]ecause of the proximity of Execution Rocks to the Connecticut border, and its location in relation to the Long Island Sound as a whole, we conclude that a Connecticut pilot may transit the New York waters surrounding Execution Rocks." Formal Opinion No. 86-F5. On the basis of this opinion, the defendants contend that the Boundary Waters Act requires that Connecticut licensed pilots be authorized for vessels traversing Long Island Sound if entering or leaving Connecticut Sound ports. While the New York Attorney General may have been acting in a statesmanlike fashion, seeking to interpret the statute in a neighborly fashion and to diminish the likelihood of a pilotage war, I do not agree with his conclusion that the Boundary Waters Act forbids New York from exerting control in the Western Sound waters.

The Western Sound waters, lying west of the New York-Connecticut border at the mouth of the Byram River, are bordered exclusively by New York State lands. These waters are therefore not a boundary between New York and Connecticut. They are territorial waters of New York, and are subject to regulation by New York under 46 U.S.C. § 8501(a).

Defendants argue that because the *eastern* waters of Long Island Sound are boundary waters, Connecticut pilots cannot be

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(Cont'd)
the Second Circuit reaffirmed that under §8501(b), pilots licensed by either state bordering a boundary water may service the ports on both sides. The circuit court held that under §8501(b), Connecticut pilots could pilot ships into the New York ports that lie on the eastern waters of Long Island Sound which indisputably constitute boundary waters. The court did not discuss the western portion of the Sound at issue in this case.

barred from the Sound's *western* section, bordered exclusively by New York State. The rely on § 8501(b), which provides that "The master of a vessel entering or leaving a port on waters that are a boundary between 2 States, and that is required to have a pilot under this section, may employ a pilot licensed or authorized by the laws of either of the 2 States." It is true that *The Clymene*, 9 Fed. 163 (E.D. Pa. 1881), *aff'd* 12 F. 346 (Cir. Ct. Pa. 1882), lends some support to the defendants' position. In that case, the district court held that a Delaware pilot was entitled to pilot a ship up the Delaware bay and river into the Port of Philadelphia, despite the fact that Philadelphia is situated entirely within Pennsylvania territorial waters and Pennsylvania claimed the right exclusively to regulate pilotage on its territorial waters.

I conclude, however, that this 1881 decision does not represent the state of the law. Subsequent courts have unequivocally rejected its reasoning. In *The Glenearne*, 7 F. 604 (D. Or. 1881), decided the same year as *The Clymene*, the court ruled that even though pilots from either Washington or Oregon might lawfully pilot a ship up the Columbia River, once the ship entered the Wallamet River, which was bounded on both sides by Oregon, only an Oregon Pilot could lawfully act .[7] In *Leech v. Louisiana*, 214 U.S. 175, 29 S. Ct. 552 (1909), Justice Holmes followed the reasoning of the *Glenearne*, ruling on facts similar to our own. The Court there held that although part of the Mississippi River constitutes a boundary between Mississippi and Louisiana, as to a section of the river that was exclusively

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7. In a holding directly relevant to the instant dispute, the court ruled that notwithstanding the Columbia River's status as a boundary, a ship is "bound to take the Oregon pilot over that portion of the voyage or pilotage ground within the limits of the state of Oregon, or pay him half pilotage on account of the offer and refusal" *Id.* at 608.

within Louisiana, a Mississippi State license was invalid because concurrent jurisdiction ceases at "the point at which [the waters] cease to be a boundary between two States. Neither continuity of water nor identity of name will carry them beyond that point." *Id.* at 178.[8] Similarly, in *The Swift Arrow*, 292 F. 651 (D. Mass. 1923), the court held that for concurrent jurisdiction to lie over boundary waters, the waters "must be in a real and substantial way a boundary between different jurisdictions . . . they must have, to some extent, at least, the character of a monument on a boundary line." *Id.* at 652.[9] Most recently, in *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976), *cert. dismissed*, 470 U.S. U.S. 1024 (1985), the First Circuit held that a Massachusetts pilotage license was not valid for traversing Rhode Island waters simply because the ship was heading to a Massachusetts port. *Warner* strongly affirmed the principle that each state has the right to regulate its territorial waters, and may prohibit pilotage on those waters by pilots it has not licensed. *See also Sweatt v. Florida Board of Pilot Commissioners*, 776 F. Supp. 1538 (M.D. Fla 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993)

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8. The court noted that "If the plaintiff in error had undertaken to pilot from the Gulf to Natchez [Mississippi, through the ' wafers of Louisiana], a different question would have been presented, and it may be that in that case the Mississippi license would have been good." *Id.* Because the case at bar does not involve this scenario, Justice Holmes' dicta does not impact today's decision. Additionally subsequent decisions explain why this dicta does not make sense. *See, e.g., Warner v. Dunlap*, 532 F.2d 767, 771 n.13 (1st Cir. 1976), *cert. dismissed*, 470 U.S. 1024 (1985).

9. The court in The *Swift Arrow* also noted that a ship travelling through Rhode Island into Massachusetts "was, of course, at liberty to take a Rhode Island pilot for the intervening waters; but doing so would not relieve her of the obligation to take a Massachusetts pilot for the Massachusetts port, or to pay pilotage fees, if she refused the pilot's offer." *Id.* at 653.

(boundary statute inapplicable to port on waters solely within Florida, even though access to port was through boundary waters of Florida and Georgia).

Because the Western Sound waters are New York territorial waters, as opposed to boundary waters, the provision of § 8501(b), requiring allowance for concurrent pilotage in boundary waters, does not apply. I conclude the amended § 89-b, requiring a New York pilot in the Western Sound, is consonant with the federal act.[10]

III. Where must pilots board?

The defendants contend that even if the amended § 89-b requires that ships employ New York pilots to navigate the Western Sound waters, the defendants are not liable for the fees sought by the plaintiffs for voyages from Bridgeport to New York Harbor because the plaintiffs did not offer their services at the point where they were required — the Byram River line. Rather, the pilots attempted to board at dockside in Bridgeport, with the

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10. Because the defendants had suggested in the initial briefing that New York places restrictions on access to pilotage licenses that might bar Connecticut residents from qualifying, I requested additional submissions as to any implications this might raise under the dormant Commerce Clause. In response, the defendants submitted several fragments of trial testimony from the trial of *Interport v. Sammis, supra.* Because these bits of testimony are fragmentary, and because the plaintiffs had no opportunity to cross-examine as to the issues raised in this litigation, I decline to consider them as trial evidence on this issue. Having no evidence before me on the operation of the Long Island Sound licensure procedures of the New York Board of Commissioners of Pilots, I do not reach the issue, and express no opinion on any dormant Commerce Clause implications of § 89-b.

understanding that the vessels would transport them to the Byram River line where they would assume control.[11]

Neither side has presented compelling evidence on this question. In the absence of stronger evidence of industry practice, I reject the defendants' contention. To require pilots to use a lighter, interrupting the ship's voyage, in order to offer their services, when they could easily do so by traveling a short distance to the prior port, would involve waste and inefficiency. Absent evidence of any good reasons why the vessel should not carry the pilot a short distance to the turnover point, or better evidence of industry practice, I decline to adopt such a wasteful and inconvenient standard.

Damages

Plaintiffs seek the full New York statutory Long Island Sound pilotage fee for each refused voyage. It appears, however, that a New York statute, which neither side has cited, calls for a smaller fee. While it is true that the New York regime fixes pilotage rates within the Sound on a per movement basis, based upon the size of the ship, and that defendants' ships would call for a fee of $809.73 per movement of more than 25 miles in the Sound, New York Nav. Law § 89-b(4)(b)(4) (McKinney's Supp. 1993) provides that "After entering Long Island Sound or Block Island Sound or departing therefrom, all vessels piloted for less than 25 miles shall pay a transporting charge equal to two-thirds of the statutory rate for registered vessels." Because the Western Sound waters, where plaintiff's services were required, cover a

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11. Bruce Fisher, President of Sound Pilots, testified at deposition that Sound Pilots does not own a pilotage boat for the Byram line and does not intend to purchase one. See Dep. at 36.

distance of less than 25 miles, it appears under this section that defendants are liable for only two-thirds of the standard New York-Long Island Sound statutory pilotage fee. If the plaintiffs disagree with this calculation, they may submit a brief to the court within one week. The defendants' answering brief shall be due one week thereafter. Barring plaintiffs' submission of such a brief, the court shall find a liability of two-thirds of $809.73 (or $539.82) per movement.

Conclusion

Plaintiffs are entitled to judgment for each of ten voyages transiting the Western Sound where defendants refused their services. Submit judgment on notice.

Dated: New York
November 8, 1994

SO ORDERED:

s/ Pierre N. Leval
Pierre N. Leval, U.S.C.J.

Appendix C

APPENDIX

Supreme Court, U.S.
FILED
AUG 8 1996
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(2)

No. 96-39

In The

Supreme Court of the United States

October Term, 1995

INTEROCEANICA CORPORATION, TURBANA CORP., M/V POTOMAC, her engines, boilers, tackle, etc., *in rem*, M/V POCAHONTAS, her engines, boilers, tackle, etc., *in rem*, and M/V POCANTICO, her engines, boilers, tackle, etc., *in rem*,

Petitioners,

vs.

MICHAEL BALL, C.A. MASSEY, D.J. McINERNEY and T.J. KNIERIM,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Did the State of New York violate the Boundary Waters Act, 46 U.S.C. § 8501(b), when it amended § 89-b(1) of New York's Navigation Law limiting pilotage on New York territorial waters to pilots licensed by the State of New York?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED..... i

COUNTER-STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 3

I. PETITIONERS FAIL TO DEMONSTRATE THAT THE SECOND CIRCUIT COURT OF APPEAL'S INTERPRETATION OF THE FEDERAL BOUNDARY WATERS ACT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 3

II. PETITIONERS FAIL TO DEMONSTRATE WHY THIS COURT SHOULD REVIEW ITS PRIOR INTERPRETATION OF THE BOUNDARY WATERS ACT 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES CITED

Ball v. Interoceanica Corp., 867 F.Supp. 226 (S.D.N.Y 1994), *aff'd* 71 F.3d 73 (2d Cir. 1995) 5

The Glenearne, 7 F. 604 (D.Or. 1881) 4

Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133 (2nd Cir. 1994) 6

Leech v. Louisiana, 214 U.S. 175, 29 S.Ct. 553 (1909) 3, 4, 6

Sweatt v. Florida Board of Pilot Commissioners, 776 F.Supp. 1538 (M.D. Fla. 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1993) 4, 5

The Swift Arrow, 292 F. 651 (D. Mass. 1923) 5

Warner v. Dunlap, 532 F.2d 767 (1st Cir. 1976), *cert. dismissed*, 470 U.S. 1024 (1985) 4, 5

STATUTES CITED

Boundary Waters Act, 46 U.S.C. § 8501(b) 2, 7

New York's Navigation Law § 89-b 1, 2, 3, 7

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit. The Court of Appeals Opinion is reported at 71 F.3d 73 (2nd Cir. 1995). (Pet. App. 3a-11a). (For the convenience of the Court, all citations to the district court and appellate court opinions will be to the rulings attached as Appendix A to the petition.)

COUNTER-STATEMENT OF THE CASE

Respondents, New York State licensed pilots commenced this action in the United States District Court, Southern District of New York against the Petitioners to recover pilotage fees for the pilotage of vessels in the western portion of Long Island Sound, specifically in the area of Long Island Sound west of a line running southeasterly from the mouth of the Byram River at the New York-Connecticut border to Oak Neck Port on Long Island. (Pet. App. 33a). The pilotage fees sought here covered vessel movements after the passage of the amendment to § 89-b of New York's Navigation Law in 1991.

In November, 1991 New York's Navigation Law § 89-b was amended to require that all foreign flag vessels and all American vessels under register must utilize the services of a licensed New York Long Island Sound pilot in waters west of the Byram River Line which are New York territorial waters. A review of the geographic area makes it absolutely clear that the water involved, west of the Byram

River Line, was not a boundary water between New York and Connecticut, but rather waters exclusively within the State of New York. The purpose and effect of the amendment to § 89-b was to improve the safety of navigation and protect the environment in New York waters. On the other hand, Petitioners assert incorrectly that the exclusive area for New York pilots was extended to gain economic benefits and substantially increase pilotage rates. However, the amendment did not extend the New York exclusive pilotage area nor did it result in increased pilotage rates. The amendment, which was designed both to insure a safe place for a pilot to transfer the helm, also serves to delineate the boundary waters of Long Island Sound from the New York territorial waters of Long Island Sound.

Petitioners do not deny that they refused the services of the Sound Pilots but instead take the position, among others, that the amendment to § 89-b was contrary to the Federal Boundary Waters Act, 46 U.S.C. § 8501(b). ("**ACT**") Petitioners' general assertion that Long Island Sound is a boundary water without distinguishing where it in fact is a boundary water and where it does not serve as a boundary between New York and Connecticut ignores the realities existing. It is clear when viewing a nautical chart that waters **east** of the Byram River Line serve as a boundary between New York and Connecticut and are waters in which both states have concurrent jurisdiction pursuant to the Act. The waters **west** of the Byram River Line are, however, wholly within the State of New York and are territorial waters of New York

which do not serve as a boundary between the states. (Pet. App. 33a).

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAIL TO DEMONSTRATE THAT THE SECOND CIRCUIT COURT OF APPEAL'S INTERPRETATION OF THE FEDERAL BOUNDARY WATERS ACT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioners principally claim that this Court should grant a writ of certiorari "so that this Court may consider the meaning and scope of the Boundary waters Act and whether New York's actions . . . comport with the Act." (Pet. 10) Petitioners do not call upon this Court to resolve any unsettled or conflicting decisions of this or any court. Instead, Petitioners request that this Court review an opinion by the Second Circuit Court of Appeals that comports with both an earlier decision of this Court, as well as other federal circuit courts. The petition should therefore be denied.

The Second Circuit affirmed the District Court's determination that the amendment to New York's Navigation Law § 89-b did not contravene the Act since the waterway in question i.e. the waters west of the Byram River Line, were not boundary waters but rather New York territorial waters. This decision is wholly consistent with this Court's prior interpretation of the Act in *Leech v. Louisiana*, 214 U.S. 175, 29 S.Ct. 553 (1909). In fact, the principles articulated by the District Court and affirmed

by the Second Circuit are wholly consistent with those interpretations made by other district and appellate courts that have been faced with a boundary water issue. *See, e.g., Warner v. Dunlap,* 532 F.2d 767 (1st Cir. 1976), *cert. dismissed,* 470 U.S. 1024 (1985); *Sweatt v. Florida Board of Pilot Commissioners,* 776 F.Supp. 1538 (M.D. Fla. 1991), *aff'd,* 985 F.2d 578 (11th Cir. 1993).

It is a well settled principle "that the limit of the waters referred to [in the Act] is the point at which they cease to be a boundary between two states" *Leech, supra,* at 178. In *The Glenearne,* 7 F. 604 (D.Or. 1881), the court held that pilots from either Washington State or Oregon could pilot the vessel up the Columbia River, but once the vessel entered the Willamet River bounded on both sides by the State of Oregon the vessel was no longer on boundary waters and only an Oregon pilot could pilot the vessel.

In *Leech, supra,* this Court interpreted the scope of boundary waters and the consequent application of the Act. In a decision analogous to the instant matter, this Court held that although part of the Mississippi River constitutes a boundary between Mississippi and Louisiana, New Orleans was exclusively within Louisiana and was therefor not boundary waters. Consequently, only a Louisiana State licensed pilot could bring a vessel into New Orleans. Justice Holmes stated in his clear and unequivocal opinion:

> " . . . that the limit of the waters referred to is the point at which they cease to be a boundary between two states. Neither continuity of water

> nor identity of name will carry them beyond that point."

Id., at 178.

Since this Court's interpretation of the Act over 90 years ago, numerous federal courts have interpreted the Act in a consistent manner. In *The Swift Arrow*, 292 F. 651 (D. Mass. 1923), the court observed that in order to be considered boundary waters they:

> "must be in a real and substantial way a boundary between different jurisdictions; ie. that the boundary must be based on the presence of such waters, and that they must have, to some extent, at least, the character of a monument on a boundary line." *Id.*, at 652.

Similarly, in *Warner v. Dunlap, supra*, the First Circuit held that a Connecticut license was not valid to traverse the waters of Rhode Island despite being en route to a Connecticut port. As the District Court in the instant matter observed, "*Warner* strongly affirmed the principle that each state has the right to regulate its territorial waters, and may prohibit pilotage on those waters by pilots it has not licensed." *Ball* (Pet. App. 29a). Even more recently in *Sweatt v. Florida Board of Pilot Commissioners*, 776 F.Supp. 1538 (M.D. Fla. 1991), *aff'd*, 985 F.2d 587 (11th Cir. 1993), the Eleventh Circuit held that the Act was inapplicable to a port situated on territorial waters of Florida despite the fact that access to the port was through boundary waters of Florida and Georgia. Likewise, in the instant matter, the Second Circuit preserved the State of New York's right to regulate its territorial waters. (Pet. App. 6a-7a).

An examination of federal case law, and in particular this Court's decision in *Leech*, reveals that the District Court's decision and the subsequent affirmance by the Second Circuit is consistent with the well settled principle that waters that do not form a natural boundary between two states are not boundary waters and are therefore under the exclusive jurisdiction of the state in which they are situated. Accordingly, the issue presented to this Court is not appropriate for Supreme Court review since its determination in the lower courts was consistent with and follows prior decisions of this Court, as well as other federal courts.

II. PETITIONERS FAIL TO DEMONSTRATE WHY THIS COURT SHOULD REVIEW ITS PRIOR INTERPRETATION OF THE BOUNDARY WATERS ACT.

Petitioners have likewise failed to demonstrate that this Court should re-evaluate its prior interpretation of the Boundary Waters Act and review the appellate Court's determination that New York's Navigation Law 89-b does not violate that Act. Petitioners' claim appears to rest on the belief that this Court should grant a writ of certiorari so that it may review the Act in light of what Petitioners see as the purpose behind the act. Petitioners' reliance on *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 136-137 (2nd Cir. 1994) to evidence congressional intent is misplaced. In *Sammis* the court stated *in dicta* that "[t]he boundary statute is succinct, intelligible and specific, however, and we have no call to consult legislative history." *Sammis, supra* at 136-137. Likewise, in *Leech*

this Court afforded the Act its plain meaning in determining what constitutes boundary waters. Petitioner has failed to demonstrate any plausible reason for having this Court reconsider the meaning and scope of the Act.

Petitioners have also failed to illustrate that the lower courts' analysis was incorrect in its interpretation of the Act. Despite petitioners' claim otherwise, New York did not "arbitrarily expand the exclusive pilotage zone for its pilots" (Pet. 6), rather New York defined the point at which the waters of the Long Island Sound cease to be a boundary between the two states. An examination of the geographic area makes it clear that the Byram River Line is a line in which all waters west of the line are solely New York territorial waters. As the District Court stated:

> "Because the Western Sound waters are New York territorial waters, as opposed to boundary waters, the provision of § 8501(b), requiring allowance for concurrent pilotage in boundary waters, does not apply. I conclude that the amended § 89-b is consonant with the Federal Act."

(Pet. App. 30a).

Having failed to demonstrate that the waters west of the Byram River Line are anything other than New York State territorial waters, Petitioners ask this Court to alter the standard upon which boundary waters are delineated. Petitioners have afforded no justification for this Court to review either the Act or the Second Circuit's interpretation of it.

CONCLUSION

Petitioners set forth no important or special reasons for this Court to consider. For the foregoing reasons, their Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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